

No. 47495-6-II

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STATE OF WASHINGTON

COURT OF APPEALS FOR DIVISION II  
OF THE STATE OF WASHINGTON

---

CORINN JAMES and IAN JAMES  
Appellants,

v.

CASEY MCMURRY and "JANE DOE" MCMURRY  
Respondents,

---

APPELLANTS' BRIEF

---

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## **I. INTRODUCTION**

This case arises out of a rear-end motor vehicle collision occurring on December 20, 2011 involving Appellants Corinn and Ian James, (the James') and tortfeasor Casey McMurry (McMurry). After a diligent but unsuccessful effort to find and serve Casey McMurry including hiring a private investigator, the James' ultimately perfected service of process on McMurry by service on the Washington State Secretary of State – a method of personal service permitted by RCW 46.64.040. RCW 46.64.040 does not require the serving party to file any documents with the court to accomplish service thereunder – yet the Superior Court dismissed the James' case because no affidavit of compliance with RCW 46.64.040 was filed with the Court before the statute of limitations ran. The Court erred, giving rise to this appeal.

## **II. ASSIGNMENTS OF ERROR**

### **A. The Superior Court erred when it granted McMurry's Motion to Dismiss.**

Issue: Did the Court err by ruling that compliance with RCW 46.64.040 requires filing an affidavit of compliance with the Court – which was the basis for the Court dismissing the James' case – when RCW 46.64.040 clearly does not require filing any affidavit with the Court.

### **III. STATEMENT OF THE CASE**

On December 19, 2014, this case was filed in Thurston County Superior Court. CP 4; 6.

The police traffic collision report concerning the collision giving rise to this lawsuit shows an address for Defendant Casey McMurry of 7740 Prine Dr SW, Olympia, WA 985127544. CP 56;76.

The Plaintiff's counsel engaged Mike Crockett, licenced private investigator and owner of C&A Investigations, to locate a service address for Defendant Casey McMurry. CP 55:17-19; 95:3-4.

On December 19, 2014, Mr. Crockett performed a search in an effort to locate Mr. McMurry. The last known address listed for McMurry on investigator Crockett's report was 2617 Judd St. SE, Olympia, WA 98503. CP 101.

Per the Declarations of Non-Service of Scott Gogan, dated December 28 and 29, 2014, service of the Summons and Complaint, Notice of Assignment and Notice of Trial Scheduling Date, and Scheduling Questionnaire was attempted on Casey McMurry and "Jane Doe" McMurry on December 28, 2014 at 2617 Judd St. SE, Lacey, WA 98503. CP 62; 66-67. Per the Declaration of Non-Service, while attempting service, Mr. Gogan was unable to effectuate service at the address because he was told by a

resident at the address that Defendants were unknown. *Id.*

Per the Declaration of Non-Service by Holly Hart dated February 14, 2015, service of the Summons and Complaint, Notice of Assignment and Notice of Trial Scheduling Date, and Scheduling Questionnaire was attempted on Casey McMurry on February 11, 2015 and then again on February 14, 2015 at 7740 Prine Dr SW, Olympia, WA 98512. CP 61; 64. Per the Declaration of Non-Service, service was unsuccessful. CP 61; 64. Per the Declaration of non-service, Ms. Hart was informed that McMurry had moved. CP 64.

Per the Declaration of Non-Service by Holly Hart dated February 17, 2015, service of the Summons and Complaint, Notice of Assignment and Notice of Trial Scheduling Date, and Scheduling Questionnaire was attempted on “Jane Doe” McMurry on February 11, 2015 and then again on February 14, 2015 at 7740 Prine Dr SW, Olympia, WA 98512. CP 61; 65. Per the Declaration of Non-Service, service was unsuccessful. CP 65.

Additionally, based on information from private investigator Mike Crockett, there was an address of 3938 Clearfield Dr SE, Olympia, WA 98503, associated with a woman named Carissa Rosenbalm. CP 92:3-4; 55:17-19. Ms. Rosenbalm was believed to possibly be McMurry’s girlfriend/fiancee. CP 92:4-5; 55:17-19. Service of the Summons and

Complaint, Notice of Assignment and Notice of Trial Scheduling Date, and Scheduling Questionnaire was also attempted on Casey McMurry and “Jane Doe” McMurry on February 19, 2015 at this 3938 Clearfield Dr SE, Olympia, WA 98503 address. CP 62; 68, 69. Service was unsuccessful. CP 62; 68; 69. Per the Declaration of Non-Service McMurry did not live at that address. CP 68.

Prior to serving McMurry via service through the Washington Secretary of State, the James’ counsel executed an “Affidavit of Tim Friedman re Due Diligence” and an “Affidavit of Tim Friedman re RCW 46.64.040.” CP 61-69; 71-72;

On February 25, 2015, prior to the 90 day statute of limitations tolling period, the James’ counsel’s office mailed two copies of the Summons and Complaint, with the Affidavit of Tim Friedman re RCW 46.64.040 and with the Affidavit of Tim Friedman re Due Diligence enclosed therewith, and a copy of the Notice of Assignment and Notice of Trial Scheduling Date and Scheduling Questionnaire, as well as a check in the amount of \$50.00, to the Washington Secretary of State at 801 Capitol Way South, Corporations Division, PO Box 40234, Olympia, WA98504-0234. CP 71.

On February 25, 2015, prior to the 90 day statute of limitations tolling period, the James’ counsel’s office mailed, via registered mail return receipt



requested, two copies of the Summons and Complaint, with the Affidavit of Tim Friedman re RCW 46.64.040 and with the Affidavit of Tim Friedman re Due Diligence enclosed therewith, and two copies of the Notice of Assignment and Notice of Trial Scheduling Date and Scheduling Questionnaire, to Casey McMurry at the 2617 Judd St. SE, Lacey, WA 98503 address. CP 71-72.

On March 6, 2015, the James' counsel's office sent McMurry's attorney's office a copy of the Summons, Complaint, Notice of Assignment and Notice of Trial Scheduling Date and Scheduling Questionnaire – and it was received by defense counsel on March 9, 2015. CP 84-85.

On March 7, 2015, the James' counsel's office received the confirmation of service letter from the Washington State Secretary of State. CP 93:8-9; 55:17-20; 82. This confirmation of service letter states in pertinent part:

The undersigned hereby states that she is a duly appointed and acting clerk in the office of the Secretary of State responsible for the receipt and handling of the service of process under the Washington State statute indicated and is qualified to make the following statements:

On March 3, 2015, Summons/Complaint and other legal documents in the action relating to: Corinn James And Ian James (plaintiff) vs. Casey McMurry And Jane Doe McMurry (defendant), Cause No. 14 2 02400 0, were received in the office of the Secretary of State. Said documents were placed on file and a duplicated copy was mailed via "Certified" mail,

item number 91 7199 9991 7031 7900 3208 to:

...

the non-resident motorist at the last known address as supplied by the plaintiff or his/her representative (RCW 46.64.040). CP 82.

On March 11, 2015, prior to the 90 day statute of limitations tolling period, the James' counsel filed the confirmation of service document from the Secretary of State with the Court – and it was filed under cover pleading entitled “Proof of Service of Summons; Complaint for Damages”. CP 93:2 2-23; 55:17-20; 87-89.

On March 12, 2015, the James' counsel's office received Malarchick Law Office's Notice of Appearance, on behalf of Defendants Casey and Jane Doe McMurry, along with a fully executed Agreement to Allow Electronic Service. CP 93:24 - 94:1; 55:17-20; 13-14.

McMurry was served via the Washington State Secretary of State. Proof of service was filed. Defense counsel appeared. This all occurred before the 90 day tolling period ran.

On April 7, 2014, McMurry filed a “motion to dismiss with prejudice for failure to serve.” On April 17, 2015, the lower Court heard argument on McMurry's motion. The Court ruled that service was non-compliant with RCW 46.64.040 due only to the fact that the affidavit of compliance was not filed with the Court within the 90 day tolling period. There is no requirement

in the statute to file an affidavit of compliance with the Court – yet it was on the basis that no affidavit of compliance was filed that the Court dismissed the James’ case. VRP 25:2-4; 29:3-4. The James’ appealed.

#### **IV. ARGUMENT**

##### **Standard of Review**

This court reviews questions of law and conclusions of law de novo. *Weyerhaeuser Co. v. Calloway Ross, Inc.*, 133 Wash. App. 621, 624, 137 P.3d 879 (2006).

##### **A The Statute of Limitations Tolls for 90 days and service via Secretary of State is personal service.**

This lawsuit was filed with the Court on December 19, 2014. The statute of limitations was tolled by 90 days, per RCW 4.16.170. This tolling period includes tolling to effect service under RCW 46.64.040 via the Secretary of State. “We thus conclude that when a plaintiff commences suit by filing a complaint, it is logical to construe RCW 4.16.170 as extending by 90 days the time period for satisfying the provisions of RCW 46.64.040.” *Martin v. Triol*, 121 Wash. 2d 135, 148-49, 847 P.2d 471 (1993).

We conclude that substituted service pursuant to RCW 46.64.040 satisfies the requirement of RCW 4.16.170 for “personal service” of process and affirm the Court of Appeals, holding that RCW 4.16.170 extends for 90 days the time in which parties may use the procedures under RCW 46.64.040 for substituted service of process, even if the 3-year time limit for such service expires during the 90-day period.

*Id* at 135.

“The Legislature has, however, chosen to identify this type of service as a form of “personal” service. . . . Where language of a statute is not ambiguous, there is no need for judicial interpretation. In such a case, we accept the legislative characterization of the statute's procedures as a form of “valid personal service”. *Id.* at 149-50.

**B. Service on McMurry via the Secretary of State does not require filing an affidavit with the Court, and the lower Court erred in dismissing the James’ case.**

“ . . . the trend of modern law is to interpret court rules and statutes to allow decision on the merits of the case.”

*Coggle v. Snow*, 56 Wash. App. 499, 507, 784 P.2d 554 (1990).

This Court can see from the statute that sets forth how to accomplish service via the secretary of state, RCW 46.64.040, that there is no requirement to file the affidavit of compliance with the court. There is **nothing** in RCW 46.64.040 that requires or even mentions filing an affidavit with the Court. “Where language of a statute is not ambiguous, there is no need for judicial interpretation.” *Martin v. Triol*, 121 Wash. 2d 135, 149, 847 P.2d 471 (1993). RCW 46.64.040 provides:

The acceptance by a nonresident of the rights and privileges conferred by law in the use of the public highways of this state, as evidenced by his or her operation of a vehicle thereon, or the operation thereon of his or her vehicle with his

or her consent, express or implied, shall be deemed equivalent to and construed to be an appointment by such nonresident of the secretary of state of the state of Washington to be his or her true and lawful attorney upon whom may be served all lawful summons and processes against him or her growing out of any accident, collision, or liability in which such nonresident may be involved while operating a vehicle upon the public highways, or while his or her vehicle is being operated thereon with his or her consent, express or implied, and such operation and acceptance shall be a signification of the nonresident's agreement that any summons or process against him or her which is so served shall be of the same legal force and validity as if served on the nonresident personally within the state of Washington. Likewise each resident of this state who, while operating a motor vehicle on the public highways of this state, is involved in any accident, collision, or liability and thereafter at any time within the following three years cannot, after a due and diligent search, be found in this state appoints the secretary of state of the state of Washington as his or her lawful attorney for service of summons as provided in this section for nonresidents. Service of such summons or process shall be made by leaving two copies thereof with a fee established by the secretary of state by rule with the secretary of state of the state of Washington, or at the secretary of state's office, and such service shall be sufficient and valid personal service upon said resident or nonresident: PROVIDED, That notice of such service and a copy of the summons or process is forthwith sent by registered mail with return receipt requested, by plaintiff to the defendant at the last known address of the said defendant, and the plaintiff's affidavit of compliance herewith are appended to the process, together with the affidavit of the plaintiff's attorney that the attorney has with due diligence attempted to serve personal process upon the defendant at all addresses known to him or her of defendant and further listing in his or her affidavit the addresses at which he or she attempted to have process served. However, if process is forwarded by registered mail and defendant's endorsed receipt is received and entered as a part of the return of process then the foregoing affidavit of plaintiff's attorney need only show

that the defendant received personal delivery by mail: PROVIDED FURTHER, That personal service outside of this state in accordance with the provisions of law relating to personal service of summons outside of this state shall relieve the plaintiff from mailing a copy of the summons or process by registered mail as hereinbefore provided. The secretary of state shall forthwith send one of such copies by mail, postage prepaid, addressed to the defendant at the defendant's address, if known to the secretary of state. The court in which the action is brought may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action. The fee paid by the plaintiff to the secretary of state shall be taxed as part of his or her costs if he or she prevails in the action. The secretary of state shall keep a record of all such summons and processes, which shall show the day of service.

The James' mailed two copies of the Summons and Complaint, with the Affidavit of Tim Friedman re RCW 46.64.040 and with the Affidavit of Tim Friedman re Due Diligence enclosed therewith, and a copy of the Notice of Assignment and Notice of Trial Scheduling Date and Scheduling Questionnaire, as well as a check in the amount of \$50.00, to the Washington Secretary of State at 801 Capitol Way South, Corporations Division, PO Box 40234, Olympia, WA98504-0234. CP 71-72.

The James' mailed, via registered mail return receipt requested, two copies of the Summons and Complaint, with the Affidavit of Tim Friedman re RCW 46.64.040 and with the Affidavit of Tim Friedman re Due Diligence enclosed therewith, and two copies of the Notice of Assignment and Notice of Trial Scheduling Date and Scheduling Questionnaire, to Casey McMurry

at the 2617 Judd St. SE, Lacey, WA 98503 address. CP 71-72.

Finding that RCW 46.64.040 was not complied with because James' counsel did not file an affidavit of compliance with the Court was error by the lower Court.

Moreover, James' counsel filed with the Court the confirmation of service letter from the Washington State Secretary of State - and this too was done prior to the 90 day tolling period. CP 93:2 2-23; 55:17-20; 87-89. This document, *filed with the Court by James' counsel*, sets forth:

- (a) That there is a legal action "relating to: Corinn James And Ian James (plaintiff) vs. Casey McMurry And Jane Doe McMurry (defendant);
- (b) The cause number, identified as "Cause No. 14 2 02400 0";
- (c) Corinn and Ian James are identified and then labeled as "Plaintiff";
- (d) Casey McMurry and Jane Doe McMurry are identified as then labeled as "Defendant";
- (e) And the author is a duly appointed and acting clerk in the office of the Secretary of State responsible for the receipt and handling of the service of process under the Washington state statute indicated ;
- (f) and the statute is indicated as RCW 46.64.040.

CP 88.

In 2012, Division I of the Court of Appeals recognized the plain words of RCW 46.64.040, and set forth what was required to comply therewith – and nowhere does the statute, nor the Court, require that the Affidavits be *filed* for service to be accomplished. “The plain words of RCW 46.64.040 are dispositive.” *Keithly v. Sanders*, 170 Wash. App. 683, 688, 285 P.3d 225 (2012).

In short, both service of two copies of the summons on the secretary of state and mailing of notice of such service, together with the other statutorily required documents, must be accomplished to effect proper service. **Only then does one strictly comply with the terms of RCW 46.64.040 for service of process.**

*Keithly v. Sanders*, at 688. [emphasis added]. *Keithly* was a 2012 case.

In 2015, the Court in *Larson v. Yoon* discussed what strict compliance with RCW 46.64.040 means, and cited the *Keithly v. Sanders* case – and *filing* an affidavit of compliance was not required:

Strict compliance with the statute means that “both service of the secretary of state and mailing of notice of such service forthwith to the defendant must be accomplished, in addition to the other statutory requirements.”

*Larson v. Yoon*, No. 71561-5-I, 2015 WL 2085834, at \*3 (Wash. Ct. App. May 4, 2015).

There is no “statutory requirement” in RCW 46.64.040 to file an affidavit with the Court – any such requirement would be injecting legislation



into the statute that simply does not exist.

Rather, RCW 46.64.040 clearly states that the affidavit of compliance need be “appended to the process.” The James’ counsel mailed, via registered mail return receipt requested, two copies of the Summons and Complaint, with the Affidavit of Tim Friedman re RCW 46.64.040 *and* with the Affidavit of Tim Friedman re Due Diligence **enclosed therewith**.

“The service is complete when the Secretary of State is served and the notice is mailed, . . .” *Boss v. Irvine*, 28 F. Supp. 983, 984-85 (W.D. Wash. 1939). [emphasis added].

In the present case, the Secretary of State, through its duly appointed and acting clerk, provided its confirmation of service letter dated March 4, 2015 – well within the 90 day tolling period.

“The jurisdiction attached at the time of the service, and not at the time of the filing of the return.” *W. Coast Life Ins. Co. v. Mori*, 14 Wash. 2d 310, 314, 128 P.2d 286 (1942). “ ‘[I]t is the fact of service that confers jurisdiction, not the return’ ” of service. *Jones v. Stebbins*, 122 Wash. 2d 471, 482, 860 P.2d 1009 (1993); citing *Lake v. Butcher*, 37 Wash.App. 228, 232, 679 P.2d 409, review denied, 102 Wash.2d 1020 (1984) (quoting *Williams v. Steamship Mut. Underwriting Ass’n*, 45 Wash.2d 209, 227, 273 P.2d 803 (1954)). “The lack of return of service does not deprive a court of

jurisdiction, nor does it affect the validity of the service.” *Jones v. Stebbins*, 122 Wash. 2d 471, 482, 860 P.2d 1009, 1015 (1993).

McMurry relies on *Clay v. Portik*, a 1997 case. The issue in *Clay v. Portik* was **not** whether an affidavit of compliance must be filed to perfect service under RCW 46.64.040.

Rather, the issue was whether the Plaintiff’s attorney (opposed to the Plaintiff) can sign the Affidavit of Compliance — and whether the Secretary of State lacked a statutory basis to demand an address for the defendant from the Plaintiff (i.e. whether RCW 46.64.040 requires that the Plaintiff provide the Secretary of State with the defendant’s address.) *Clay v. Portik*, 84 Wash. App. 553, 557, 929 P.2d 1132 (1997).

There is one revealing aspect of *Clay v. Portik*, and that revelation supports the James’ case by analogy. In addressing whether a Plaintiff must provide the Secretary of State with the defendant’s address, the Court noted that RCW 46.64.040 “is silent as to the need to supply an address, . . .”. *Id* at 560. The Court further stated:

Here, the statute is **unambiguous in its lack of a requirement** that a plaintiff provide the defendant's address.

*Id* at 558. [emphasis added]. The defendant argued that it was proper for the Secretary of State to have required that the Plaintiff provide it with an address for the defendant — yet the Court pointed out that there was no such

requirement in RCW 46.64.040:

. . . Portik argues that the Secretary's address requirement is proper. We disagree, finding Brown to be inapplicable and further **finding no requirement in the statute that a plaintiff supply the Secretary with the defendant's address.**

*Clay v. Portik*, at 559 [emphasis added]. The Court's finding in *Clay v. Portick* that RCW 46.64.040 is **unambiguous in its lack of a requirement** for the Plaintiff to provide the Secretary of State with an address for the defendant only supports a consistent finding in the present case that the same statute is **unambiguous in its lack of a requirement** to file an affidavit of compliance with the Court. **Nowhere** in RCW 46.64.040 did the legislature include *filing* an affidavit with the Court as part of the service-requirements.

In RCW 46.64.040, the legislature omitted a requirement to file an affidavit with the Court. The Supreme Court has recognized that such an omission shall be presumed to be intended by the legislature.

“Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of *expressio unius est exclusio alterius* applies.” *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wash. 2d 245, 280, 4 P.3d 808 (2000).[emphasis added].

“Under the maxim *expressio unius est exclusio alterius*—where a statute specifically designates the things or classes of things on which it operates—an inference arises in law that the legislature intentionally omitted all things or classes of things omitted from it”. *Mason v. Georgia-Pac. Corp.*, 166 Wash. App. 859, 864, 271 P.3d 381 (2012). [emphasis added].

The James’ counsel executed an Affidavit of Tim Friedman re Due Diligence and executed an Affidavit of Tim Friedman re RCW 46.64.040, sent copies of both Affidavits along with two copies of the Summons and Complaint and a copy of the Notice of Assignment and Notice of Trial Scheduling Date and Scheduling Questionnaire, as well as a check in the amount of \$50.00, to the Washington Secretary of State, mailed copies of both Affidavits along with two copies of the Summons and Complaint and a copy of the Notice of Assignment and Notice of Trial Scheduling Date and Scheduling Questionnaire to McMurry, filed the confirmation of service letter from the Washington State Secretary of State (which identifies Casey McMurry as the Defendant) under cover-pleading entitled “Proof of Service of Summons; Complaint for Damages” and received McMurry’s counsel’s notice of appearance ---- all within the 90 day tolling period.

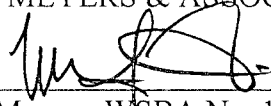
## V. CONCLUSION

Based on the foregoing, the James’ respectfully asks this Court to

overturn the lower Court's ruling. The James respectfully request that this Court rule as a matter of law that service was accomplished under RCW 46.64.040 within the 90 day tolling period and the lower Court has personal jurisdiction.

DATED: July 10, 2015.

RON MEYERS & ASSOCIATES PLLC

By:   
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Attorneys for Appellants

No. 47495-6-II

COURT OF APPEALS FOR DIVISION II  
OF THE STATE OF WASHINGTON

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CORINN JAMES and IAN JAMES  
Appellants,

v.

CASEY MCMURRY and "JANE DOE" MCMURRY  
Respondents,

---

DECLARATION OF SERVICE OF APPELLANTS' BRIEF

---

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## DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS:                    1.      APPELLANTS' BRIEF  
   2.      DECLARATION OF SERVICE

ORIGINAL TO:                    David Ponzoha, Clerk of the Court  
Via Hand Delivery                Washington State Court of Appeals, Div II  
by ABC Legal Services            950 Broadway Ste 300  
   Tacoma, WA 98402

### COPIES TO:

#### Attorneys for Respondents McMurry:

William H. Fuld

Reed McClure

1215 Fourth Avenue, Suite 1700

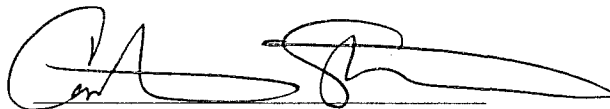
Seattle, WA 98161

[ ☐ ] Via Facsimile: 206.223.0152

[ ☒ ] Via Hand Delivery Courtesy of ABC Legal Services

[ ☒ ] Via Email: [wfuld@rmlaw.com](mailto:wfuld@rmlaw.com)

DATED this 10 day of July, 2015, at Lacey, Washington.

A handwritten signature in black ink, appearing to read 'Constance Stevenson', written over a horizontal line.

Constance Stevenson, Litigation Paralegal